FCC,[59/] the 1996 Act imposed numerous obligations upon local exchange carriers, with particularly careful attention to the responsibilities that attach to the ILECs, as the transition to competitive markets is nurtured.[60/] In considering the development of more efficient data traffic flows, the Commission should be guided by these open access and interconnection principles.

Specifically, the FCC should clarify that its Interconnection order contemplated open access to functionalities such as xDSL services, so that they can be offered by entities other than the ILECs. For instance, the FCC's Interconnection order requires the ILECs to make the local loop available as an unbundled element, including loops that are conditioned to transmit digital signals to provide ISDN, ADSL, HDSL and other services.[61/] Indeed, the Commission expressly noted the desirability of having such conditioned loops available and

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[58/](...continued)
325, at ¶¶ 10-19 (rel. August 8, 1996) ("Local Competition Order"); stayed in part pending judicial review, Iowa Util. Board v. FCC, No. 96-3406 (8th Cir. filed October 15, 1996), application to vacate denied, _ U.S. _, 117 S.Ct. 429 (November 12, 1996).

[59/] See Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (subsequent history omitted) ("Expanded Interconnection"); In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 at ¶ 15 (February 7, 1995) (describing evolution of Commission's ONA policies).

[60/] See e.g., Section 251(c), 47 U.S.C. § 251(c) (imposing obligations upon incumbent local exchange carriers). See also Section 271, 47 U.S.C. § 271 (Predicating InterLATA relief on a Competitive Checklist); Section 256, 47 U.S.C. § 256 (Coordination for interconnectivity); Section 259, 47 U.S.C. § 259 (Infrastructure sharing).

[61/] Interconnection Order, supra, at ¶ 380.

clearly held that ILECs must condition the loops so that competitive carriers can offer such digital loop functionality, even if the ILEC does not.[62/]

As a result of this pro-competitive framework, we are beginning to see some offerings by competitive carriers that help facilitate the efficient, reliable and affordable delivery of data traffic. For instance, competitors such as WorldCom, in connection with its subsidiaries MFS Communications Company and UUNET Technologies, have announced high-speed xDSL service offerings that take advantage of the unbundled loops,[63/] in direct competition with the services offered or planned by many ILECs. The FCC should continue to encourage such competition by ensuring full ILEC compliance with the 1996 Act's mandate, to provide unbundled access to all network elements. Thus, the Commission should reaffirm that its rules require all such unbundling and interconnection, even for services and functionalities not specifically enumerated. Moreover, as the need arises, the FCC should require additional unbundling, including of sub-loop elements.[64/]

[62/] Id. at ¶ 382.

[63/] "WorldCom Demonstrates New High-Speed Internet Access Service at FCC Bandwidth Forum," press release, January 23, 1997, <www.wcom.com/press/012397.html>.

[64/] While the FCC declined in its Interconnection orders to mandate such unbundling because the record did indicate its necessity, Interconnection Order at ¶¶ 390-391, technological developments may be altering the landscape. At a minimum, the FCC should express its willingness to entertain requests for mandatory sub-loop elements on an expedited basis.

In addition, the FCC should examine the need for interconnection and access to new network facilities, services and technologies that are deployed by the ILECs to address the alleged congestion problems. For instance, with respect to the proposals of some ILECs to deploy hardware and/or software that removes data traffic from the network before it goes to the ILEC's switch, the FCC should ensure equal and non-discriminatory access to such functionalities so that not only the ILECs can provide value-added functionality such as modem pools. Similar to the Commission's requirement of unbundled access to Advanced Intelligent Network-based ("AIN") services,[65/] the FCC should explicitly provide competitors with access to software and/or hardware that serves to identify data traffic for purposes of removing it from the voice circuit-switched network, and also permit competitors to deploy their own such equipment. With AIN, the FCC recognized that providing unbundled access may reduce the incumbent's incentive to develop new and advanced services,[66/] but found this risk was outweighed by the benefits of competition. Rather than preclude access, the FCC found that competitors "would be at a significant disadvantage" if they were denied these "cutting edge" services. Given the clear present and future need for increased data bandwidth, the FCC should reach a similar conclusion for competitive data providers.[67/]

[65/] Id. at ¶¶ 487-489.

[66/] Id. at ¶ 489.

[67/] Id. at ¶ 491.

C. Nascent Facilities-Based Competitive Alternatives to the Incumbent Telephone Networks Should be Encouraged

For the long-term, AOL agrees fully with the recent statement of Chairman Hundt, that "[the] best bet for promoting Internet solutions will be our overall competition policy."[68/] Today, the pro-competitive policies that have been supported by the FCC and the 1996 Act are starting to bear fruit with the possibility of two-way cable modems, wireless technologies and the use of utility company facilities to the home. While AOL has high hopes for the enormous potential of these alternatives, it is well aware that today, these technologies are largely untested and are of uncertain reliability. Moreover, while significant technological strides and innovations are occurring, ubiquitous deployment is far in the future, with the fundamental economics even less certain. Accordingly, while AOL encourages progress on all of the following facilities-based options, there must be a recognition that they are long term solutions.

First, cable television facilities, which now pass approximately 96% of all homes with televisions,[69/] offer a potentially viable facilities-based network to deliver broadband data services to the home. As cable systems upgrade their networks to the larger capacity hybrid-

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[68/] See Reed Hundt, Chairman, Federal Communications Commission, Remarks at "Convergence or Collision: Telecommunications Regulation and the Internet," Berkeley, CA, March 7, 1997, at 5.

[69/] "Marketing New Media," Paul Kagan Associates, Inc., Sept. 16 1996, at 3.

fiber coaxial cable ("HFC") systems,[70/] they become capable of being utilized for true, two-way cable modems that eliminate completely the need to use telephone company facilities. These modems promise to operate at speeds exponentially greater than even the fastest telephone network-based architectures.[71/] For AOL's members, therefore, two-way cable modems potentially offer an extremely attractive data traffic access alternative.

Despite the promise of using cable television facilities to deliver data, presently, there are several open issues that must be resolved for the widespread deployment of these two way cable modems to residential users. Not only must there be the resolution of cable modem standards,[72/] but vendors must be willing to develop standardized modems.[73/] As such, to date, the ability of AOL and others to experiment with this new technology has been constrained and limited to controlled lab-type situations.

[70/] See 1996 Annual Video Competition Report, supra, at ¶¶ 172-175 (noting that during 1996, the cable industry's deployment of fiber optic cable grew over 18% and that HFC network architecture currently exists in approximately 35% of all cable systems, with roughly one third of all subscribers served by systems with HFC architecture).

[71/] See Rouzbeh Yassini, "Data Over Cable TV: 'Modem Mania Tutorial'," ("Modem Tutorial"), March 6, 1997, prepared for the Federal Communications Commission.

[72/] Numerous organizations are addressing a standards-based cable modem solution (including the MCNS, the IEEE, the IETF, the SCTE, and DAVIC) to ensure interoperability, scalability and security. See Modem Tutorial, supra.

[73/] See Broadband Bob Report, March 3, 1997 at, 4, <www.catv.org/modem/news/bbb-report/index.html>. Critically, the non-standardized modem market is beginning to grow, and some vendors are promoting technologies including ATM and S-CDMA as alternatives. Id. See also Modem Tutorial, supra.

Other facilities-based alternatives to the telephone company's "last mile" are also beginning to emerge, particularly the numerous wireless technologies[74/] that are being proposed and deployed for delivery of data and Internet online services, such as MMDS and satellite-based services.[75/] Both fixed and mobile terrestrial services also have notable

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[74/] See generally Amy Cortese, "A Way Out of the Web Maze: It's Called Webcasting, and It Promises to Deliver the Info You Want, Straight to Your PC," Business Week, Feb. 24, 1997, at 95-104; see Ira Brodsky, "The Net Unplugged," Telephony, March 3, 1997, at 33-40 ("The Net Unplugged").

[75/] Thus, MMDS may become a viable option for wireless Internet access, although there are still remaining technical and cost issues. See "New Year Evolution: CAI Wireless Works on Remaking Its Image," Telephony, Jan. 6, 1997, at 40 (referencing a two-way trial in Hartford, Connecticut); "The Internet Kicker: Wireless Cable Eyes the Prospects of Data Access in the Search for New Customers," Cable World, Jan. 27, 1997, at 26 (citing three trials, including New York City, Rochester, N.Y., and Hartford, Conn.); "ATM Becomes Airborne: Newbridge, BNI Incorporate ATM into LMDS, MMDS Products," Telephony, March 3, 1997, at 122; "Canadian MMDS," CableFAX Daily, Feb. 28, 1997, at 2.

Likewise, satellite service providers have commenced experimentation with data delivery, including both existing DBS providers and new providers. See, e.g., "The Silver Lining Above the Clouds," Washington Post, Feb. 24, 1997, ("Silver Lining") Washington Business section at 19 (citing the Hughes Network Systems DirecPC service that uses a small dish similar to the video programming oriented DirecTV satellite broadcast service). "The Net Unplugged," supra, at 38. PanAmSat Corporation has introduced its SPOTbytes service that is designed to address the Internet capacity crunch and that will be available to ISPs who need high speed capacity unavailable from telephone companies. "Satellite Service Aims to Ease Internet Crunch," Electronic Media, Feb. 3, 1997, at 19. Orion Network Systems has embarked on a similar venture to connect ISPs internationally. See "Silver Lining," supra, at Business 19-22. In the future, Teledesic, a satellite venture backed by Bill Gates and Craig McCaw, promises to offer worldwide advanced telecommunications services, although primarily targeted at rural and remote users. See "The Net Unplugged," supra at 38; see also "The Silver Lining," supra. Other, more targeted satellite services are also being explored such as those of Orbcomm, a subsidiary of Orbital Sciences, with its global two-way messaging service that can be used to send and receive e-mail and retrieve information from remote locations via satellite. Id.

potential,[76] as do the new LMDS[77] and Wireless Communications services.[78] With technological advances and an open and increasingly more flexible spectrum policy, wireless competitors are recognizing and reacting to the need to create an economical and reliable alternative to the incumbent telephone company networks.[79] Perhaps the most significant wireless development is for fixed wireless local loop service. AT&T has recently announced

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[76] Thus, Metricom's Ricochet service uses portable radio modems in a mesh network to connect users to the Internet, and to date, has networks operating in the San Francisco Bay area, Seattle and Washington, D.C., as well as 10 university campuses, 100 schools and two corporate campuses -- Sun Microsystems and Hewlett-Packard. "The Net Unplugged," supra, at 38. AT&T Wireless, is also offering the UP.Link software, developed by Unwired Planet, to allow access to Internet or intranet documents written in hand-held device markup language (HDML) through wireless phones, two-way pagers, and hand-held personal computers. Id. at 33-36. In a similar vein, AllPen Software offers a text-only browser for Apple Computer's Newton personal digital assistant, and RadioMail Corp. has developed RadioWeb, a wireless service that allows subscribers to retrieve the text version of any World Wide Web page. Id. at 34.

[77] LMDS, for which the FCC just adopted service and auction rules, see "FCC Adopts Service and Auction Rules for LMDS," News Release, CC Docket 92-297, March 11, 1997, is being touted as having substantial promise for the delivery of data traffic.

[78] See In the Matter of Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, Report and Order, rel. Feb. 19, 1997, at ¶ 27 (holding that the service will not be limited to specific uses and noting that commenting parties specified high-speed, broadband data services as a significant potential use).

[79] Similarly, when the 300 Mhz of unlicensed National Information Infrastructure ("NII") spectrum recently set aside by the Federal Communications Commission in the 5 GHz band comes into use, In the Matter of Amendment of the Commission's Rules to Provide for Operation of Unlicensed NII Devices in the 5 GHz Frequency Range, ET Docket No. 97-5, Report and Order (rel. Jan. 9, 1997), there could be even greater wireless options, although cost issues are unresolved. Some firms have also developed fixed wireless technologies that operate in the unlicensed industrial, scientific, and medical (ISM) bands to provide service at distances of up to 10 miles. "The Net Unplugged," supra, at 38.

widescale plans to begin testing a fixed wireless network that will allow telephone users to bypass the wireline local exchange facilities.[80/] This service, according to AT&T Wireless, would offer data transmission at 128 kbps rates and could be more cost-competitive than the xDSL technology proposed by the ILECs.[81/]

All of these wireless developments offer hope that in the future, AOL and others will no longer be dependent upon ILEC facilities to connect to their residential customers. To be sure, there still remain barriers to wide-scale deployment of these services -- the lack of vendor support and certainty, limited battery life, transmission problems, and high prices. As a potential facilities-based alternative, however, these wireless options are encouraging.

Similarly, the electric utility companies are beginning to enter telecommunications markets to provide voice and data services over their fiber optic networks, often originally deployed in order to provide internal communications for their core power distribution businesses.[82/] As these networks pass virtually all individual customer premises in the power company service areas, they offer a potentially viable facility to bridge the crucial "last mile." Critically, since the 1996 Act removed a significant regulatory barrier for public

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[80/] John J. Keller, "AT&T Steps Up Fight for Local Markets," The Wall Street Journal, Feb. 24, 1997, at A3; "AT&T's Breakthrough Wireless Technology New Alternative for Local Service," press release, Feb. 25, 1997, <www.att.com/press/0297/970225.pca.html>.

[81/] See "In the Wake of the News: AT&T's Wireless Plan rattles Wireless '97," Telephony, March 10, 1997, at 38.

[82/] See "Utilities Turn Up Juice on Telecom Compete Projects," Multichannel News, ("Utilities Turn Up Juice"), Oct. 14, 1996, at 81-83.

utility holding companies' entry into telecommunications,[83/] power company movement into this area has been spurred generally, with more than a dozen such companies authorized to date.[84/] As the utility industry gains more experience in offering facilities for

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[83/] Section 103 of the 1996 Act added a new Section 34 to the Public Utilities Holding Company Act ("PUHCA") to permit registered public utility holding companies to enter the telecommunications business without prior Securities Exchange Commission permission through the acquisition or maintenance of an interest in an "exempt telecommunications company." See generally, In re Implementation of Section 34(a)(1) of the Public Utility Holding Company Act of 1935, GC Docket 96-101, Report and Order, 11 FCC Rcd 11377, FCC # 96-192 (1996). See also Video Competition Report, supra, at ¶¶ 95-98.

[84/] For example, the Delaware-based Delmarva Power Company now sells and leases fiber optic transport facilities, and expects to offer value-added services such as virtual private networks and managed bandwidth from T-1 to OC-3 soon. <http://www.delmarva.com/network.html>. Indeed, less than three weeks ago, Conectiv Communications, Inc., a newly formed Delmarva subsidiary, said it will offer local exchange and long distance service to business and residential customers in Delaware, Maryland, Pennsylvania, and New Jersey. The telephony services will be delivered using Delmarva's 400-mile fiber optic network, which is currently being expanded. "Delmarva's 'Conectiv Communications, Inc.' To Supply Regional, Local, and Long Distance Phone Service," press release reproduced at Delmarva World Wide Web site <http://www.delmarva.com/news/contel.htm>, March 4, 1997.

The Florida Power Corporation also states that it will be offering services to 40,000 homes. See "Utilities Turn Up Juice," supra, at 83. Likewise, the Glasgow Electric Plant Board a Kentucky company, provides cable television, Internet access, and other data services over its broadband network. The EPB offers basic cable for $13.50 a month and unlimited Internet access for $11.45 a month to residential customers. See "EPB Overview," <http://www.glasgow-ky.com/lan/overview.html>, March 12, 1997.

Boston Edison has also indicated that it will offer with RCN, Inc., a video programming provider, a package of local and long distance telephony, video, and high-speed Internet access in Boston and surrounding areas. "Boston Edison and C-TEC's RCN Unit Form Partnership To Offer Local Phone, Long Distance, Video, and Internet Access," Press Release, Sept. 30, 1996, <www.bedison.com/news/p_rcn.htm>. See also Video Competition Report, supra, at ¶ 98.

telecommunications purposes, they will likely be increasingly utilized as an alternative to the ILEC facilities.[85/]

It is just these types of genuine facilities-based alternatives that offer the greatest promise in delivering the high bandwidth capabilities ubiquitously to residences so as to meet the needs of users in the next century.[86/] As the Commission has recognized,[87/] the challenge for policymakers is to encourage the deployment by competitors and potential competitors of these alternatives, especially given the sometimes high costs involved. AOL submits that the continued vigorous promotion of the pro-competitive policies of the FCC and the 1996 Act,[88/] together with aggressive enforcement of safeguards to protect against anticompetitive behavior by incumbent telephone companies, is the best way to achieve the articulated goals.

[85/] Moreover, several utility companies have already expressed their intention to use their facilities in conjunction with wireless providers, such as Washington, D.C.-based Pepco, who is working with Metricom to build a network to provide wireless Internet access. See Video Competition Report, supra, at ¶ 98 (also referencing KN Energy of Nebraska who seeks to offer wireless Internet service).

[86/] As Chairman Hundt stated recently, "Infrastructure competition will permit us to stop regulating prices." See Chairman Reed Hundt, "Access Reform and Universal Service: Into the Thick of It," Speech before National Association of Regulatory Commissioners, Communications Committee, February 25, 1997, ("NARUC Speech") at 4.

[87/] NOI at ¶ 311.

[88/] See, e.g., H.R. Conf. Rep. No. 458, 104th Cong. 2d Sess 113, 117 (1996) (stating that the purpose of the Act is to open all markets to competition); 47 U.S.C. Section 257 (listing the promotion of "vigorous economic competition" as a purpose of the Act.).

As a practical matter, however, the FCC must recognize that even the nascent facilities-based alternatives delineated above can require interconnection and access to unbundled elements from the incumbent local telephone companies. The FCC is well aware that:

> Without specific, enforceable rules that let new entrants bypass or share the existing essential facilities of local networks, there is simply no chance that Americans will have a choice in local phone service. The creeping pace of competition a year after the law was passed stands as obvious overwhelming testimony to this fact.[89/]

Utility company facilities and wireless networks today are often not able to connect universally to existing data networks, but rather, must interconnect with the public switched networks and may even require additional facilities to transport traffic from existing facilities (such as for power companies) to the ILEC networks. Obstacles in reaching equitable interconnection agreements, provisioning delays, and unreasonably-priced service offerings not only stall the introduction of competition, but impede even experimentation with these facilities-based network operators.

Consequently, the FCC should continue to reaffirm its commitment to rational and efficient economic pricing in both the Local Competition/Interconnection context,[90/] and in the Universal Service proceeding,[91/] and should scrutinize carefully ILEC cost data to

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[89/] NARUC Speech, supra, at 3.

[90/] Local Competition Order, supra, at ¶¶ 3, 11, 29, 672, 679.

[91/] In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, FCC 96-J3 (rel. November 8, 1996).

ensure that public policy subsidies are made explicit, as required by the 1996 Act.[92/] Likewise, the Commission must continue its commitment to vigorous enforcement of its rules, as it is the experience of AOL and the competitive local exchange carriers ("CLECs") upon whom it sometimes relies,[93/] that ILEC resistance to compliance with the rules that seek to foster open competition can be both overt and subtle.[94/] While such may be the expected reaction of an incumbent in the face of competitive threats, the FCC must pro-actively ensure that competitors are able fairly to gain a foothold in the market.[95/]

Consistent with the goal of promoting facilities-based competition, the Commission should also adopt home wiring policies that encourage broadband infrastructure competition

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[92/] 47 U.S.C. § 254.

[93/] See AOL NPRM Comments at 11.

[94/] For example, despite clear language regarding the requirements for ILECs to have available Operations Support Systems ("OSS"), ILECs have failed to do so. See "Industry Continues Universal Service Battle at Hearing," Communications Daily, March 14, 1997, at 2-3. Indeed, almost immediately after the Commission reaffirmed its OSS implementation requirements, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Second Order on Reconsideration, CC Docket No. 96-98 FCC #96-476, rel. Dec. 13, 1996, at least one ILEC sought a waiver of those obligations. See "Pleading Cycle Established for Comments of US WEST's Petition for Wavier of Operation Support Systems Implementation Requirements," CCBPol 96-25, DA #96-2179, rel. Dec. 23, 1996.

[95/] Accordingly, the FCC should not reduce its regulatory oversight, or adopt a wholly "market-based" approach to regulation in the absence of genuine and substantial competition.

for both residential and multiple dwelling unit customers.[96/] Multiple broadband wires create competition on a service-by-service basis. As a result, Internet online service providers and other suppliers of broadband content would have more than one route into a subscriber's home. Thus, the Commission should shun policies that create an environment in which a single, broadband wire is transferred back and forth between multiple providers competing to offer an integrated package of services to a particular dwelling. In AOL's experience, only when there is a genuine choice among facilities for the provision of services are the public interest benefits of lower prices, higher quality and enhanced innovation fully realized for users.

III. THE COMMISSION MUST ENSURE THAT THE ILECs DO NOT USE THEIR RESIDUAL MARKET POWER TO STIFLE NEW INVESTMENT AND NEW ENTRY IN THE BROADBAND NETWORK SERVICES MARKET

If the full benefits of robust competition are to be attained, during the transition to local competition, the Commission's policies must deter the ILECs from using their residual market power over local telephony to impede the ability of independent ISPs to compete. Today, almost all large ILECs, including every BOC, have launched or announced plans to

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[96/] See Comments of National Cable Television Association, filed April 17, 1996, at 6-7, in In the Matter of Telecommunications Services - Inside Wiring, CS Docket No. 95-184 ("Inside Wiring").

offer Internet access service.[97/] And, already there are signs that the ILECs will use their local exchange monopoly power to obtain gain unfair advantages in the Internet online services business.

For example, Pacific Bell has been offering five months worth of free Internet access to any customer purchasing a second telephone line for $11.25 per month.[98/] Bell Atlantic also provided discounted offerings of Internet access in conjunction with the purchase of second telephone lines or ISDN services.[99/] Such promotions highlight the ILECs' incentive and ability to leverage their broad customer base and monopoly revenue streams to compete unfairly in the adjacent Internet online services business.[100/]

[97/] See e.g. Bell Atlantic Offer of CEI to Providers of Internet Access Services, DA 96-891, Order (rel. June 6, 1996) (approving Bell Atlantic CEI plan for Internet access service); FCC Public Notice, Pleading Cycle Established for Comments on SWBT's CEI Plans for Internet Support Services, DA 96-1031 (rel. June 26, 1996). "Telephone Companies Target ISP Market," Inter@ctive Week, March 10, 1997 ("[A]ll but one of the country's largest telephone companies have launched an Internet service provider subsidiary. The one exception -- NYNEX Corp. -- says it will set up shop during the second quarter").

[98/] See Bandwidth Forum, Tr. at 43.

[99/] "Bell Atlantic.Net Available in D.C. and Baltimore," Communications Today, 1996 WL 10162191 (Comnews database), August 1, 1996.

[100/] See Bandwidth Forum Tr. at 41, Testimony of Mike Trest, Chief Scientist, ATMnet:

> Our concerns about LECs movement into the Internet service provider business . . . is real. We need to address that concern because years of regulatory protection have provided these LECs with economic powers which could be inappropriately used to restrain non-telco related ISPs.

Indeed, Bell Atlantic trumpets its ability to use its existing monopoly telephone ratebase -- and the operations infrastructure funded by that ratebase -- to facilitate its entry into the broadband services market.[101/] Moreover, the concerns regarding the ILECs ability to cross-subsidize their provision of Internet online services are exacerbated by the inadequacy of the present cost allocation rules for tracking joint and common costs incurred in connection with the integrated provision of regulated and unregulated services over the same network.[102/] Thus, at present, there are no assurances that ILECs will actually incur real costs for the basic transmission components of their Internet access offerings that must also be made available to competitors,[103/] as the ILECs' books can reflect the tariffed transmission rate that it pays to themselves, while excluding some or all other cost components of their Internet service offerings from the retail rate charged to end users.

[101/] See "Catching Up to Ray Smith," Telephony, June 24, 1996, at 104-06. Ray Smith, Bell Atlantic's Chairman and CEO, has stated that his company plans to rely on switched broadband as its principal strategy for penetrating the Internet online services business and other unregulated broadband markets because the advantages of such an approach are that:

> [I]t's on the embedded base, so it's not a green-leaf or green-tree strategy starting from scratch. It's on an embedded base that has in it switching, backroom, operating systems. It has customer care at the level that they want it, and it has all the installation, repair and service ordering and billing in place. And the telephone companies have a far superior capital position. . . .

[102/] See e.g., Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services, Notice of Proposed Rulemaking, CC Docket No. 96-112, FCC No. 96-124 (released May 10, 1996), at ¶¶ 22-25.

[103/] See, e.g., Comments of MFS Communications Company, Inc., in In the Matter of Offer of Comparably Efficient Interconnection to Providers of Enhanced Internet Access Services, ("Bell Atlantic CEI Plan"), CCBPol. 96-09, April 12, 1996, at 6-7.

Meanwhile, the ILECs' competitors would be actually incurring the tariffed transmission charges, which are priced above their economic costs, as well as the costs associated with the other components of their Internet service offerings.[104/]

In addition, Pacific recently released a "study" purporting to demonstrate that consumers strongly support ILECs' using customer proprietary network information ("CPNI") to market related, competitive services.[105/] Pacific contends that it may use CPNI to market unregulated services without furnishing it to competitors, and that such a practice would not implicate competitive concerns.[106/] Such a practice clearly would provide Pacific with a significant marketing advantage over competitive ISPs.

Similarly, the Commission should scrutinize the contention of some ILECs that they need not provide competing enhanced service providers with access to ISDN and discounted

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[104/] The FCC should also guard against other types of regulatory gaming by the ILECs as they offer their own Internet services. Thus, with respect to the Bell Atlantic offering, there are serious questions as to whether the service violates the 1996 Act's prohibition against the provision of interLATA services prior to a Commission determination of its compliance with the Section 271 checklist. See Bell Atlantic CEI Plan, supra. Unquestionably, however, the efficacy of the local competition incentives embodied within the Section 271 checklist are undermined if the BOCs are permitted into the lucrative global Internet access market before their markets are fully open to facilities-based competitive providers of local telephone services in accordance with the requirements of Section 271.

[105/] See "Public Attitudes Toward Local Telephone Company Use of CPNI," Report of a National Opinion Survey Conducted November 14-17, 1996, sponsored by Pacific Telesis Group, at 8. Pacific also maintains that large majorities support the sharing of CPNI with affiliates marketing related, competitive services. See Letter from Gina Harrison, Pacific Telesis Group, to William Caton, January 16, 1997, Attachment A at 8.

[106/] Id. at 17-18.

second lines that will be offered to their Internet services customers.[107] This is precisely the type of exclusionary conduct that could impede competition in the Internet online services market. The ILECs movement into the Internet online services business underscores the need, at a minimum, to assure compliance with the nondiscrimination and equal access principles embodied in the Communications Act,[108] as well as the Commission's Open Network Architecture (ONA) and Comparably Efficient Interconnection (CEI) rules.[109]

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[107] See "Bell Atlantic CEI Plan," supra, Petition for Reconsideration of MFS Communications Company, Inc., July 3, 1996, at 23-24; id., Bell Atlantic's Opposition to Petition for Reconsideration, August 9, 1996, at 5-6.

[108] See 47 U.S.C. §§ 201, 202. In addition, there are also questions of compliance by some BOCs with the 1996 Act's separate affiliate, interLATA rules. 47 U.S.C. § 272. Thus, even though Bell Atlantic is providing its customers with global Internet access, it maintains that the service does not cross LATA boundaries and therefore need not be offered through a separate subsidiary. In the Matter of Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Internet Access Services, CCBPol. 96-09, DA 96-881, Order, 11 FCC Rcd 6919 at ¶¶ 48-51 (rel. June 6, 1996). The absence of any structural separation between Bell Atlantic's local exchange operations and its Internet access offering enhances its incentive and ability to engage in the kind of anti-competitive transfer pricing schemes described herein.

[109] For example, the Commission's rules require that the BOCs provide public notice regarding any network change that will affect its interoperability with other service providers or affect a competing service provider's performance or ability to provide service. Specifically, BOCs offering enhanced services must publicly disclose technical information about a new or modified service six to twelve months before introducing such service. See, e.g., In the Matter of Implementation of the Local Competition Providers of the Telecommunications Act of 1996, CC Docket No. 96-98, Second Report and Order, FCC 96-333 (rel. Aug. 8, 1996) at ¶ 214; see also Computer III Phase II Reconsideration Order, 3 FCC Rcd at 1164-65 (1988). Pacific, however, recently filed a short term network change notification with the Commission, that would enable it to roll-out two new Internet-related services well in advance of the six to twelve month timeline set by the Commission. See "Common Carrier Bureau Network Change Notification," Public Notice, March 18, 1997.

Moreover, as noted above, a number of ILECs, including Pacific Bell, have indicated plans to "plac[e] voice and data on separate network paths.[110/] ILEC proposals submitted under the guise of relieving network congestion should not permit the incumbent local telephone companies to become data services gatekeepers. By deploying modem concentrators and packet-based trunk connectors in each central office,[111/] the ILECs' packet network links may indeed promote faster and more efficient delivery of broadband services, but they could also cement the ILECs as data transmission gatekeepers. If non-telco ISPs are able to access the broadband link offered through IITS only by effectively putting the cost structure of their transmission and aggregation function almost entirely into the hands of the ILECs,[112/] then the competitiveness and diversity of the Internet online

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[110/] Pacific Telesis Inside Line, #93, at 7. Pacific states that the "development of separate network paths puts Pacific Bell on the technological cutting edge as data traffic grows. 'We're now leveraging our existing facilities and making strategic investments to create two paths: one for voice and one for fast-packet data." Id. See also Bandwidth Forum, Tr. at 53.

[111/] See "Internet Evolution: Commercialization Continues," <atc@abovethecrowd.com>, Newsletter Issue: 97-04.

[112/] Id. (Noting that President of one Internet Service provider "said he would be wary of getting rid of his modems to use Bell's equipment, putting him at the mercy of the phone company's pricing for the service"). See also id. (Quoting another ISP as being "apprehensive about . . . losing control").

services business would be severely harmed without any corresponding benefit for consumer welfare.[113/]

Likewise, the ILECs should be precluded from harming competition by providing competing ISPs with transmission functionality that is inferior or slow. Indeed, such non-discriminatory access is particularly critical since the ILECs are seeking to differentiate themselves in the Internet online services market by claiming that the speed and performance of their network is superior to their competitors, notwithstanding the fact that their competitors are using the ILECs' networks to reach their customers.[114/]

The Commission also should preclude the ILECs from hindering competition by tying the purchase of needed services to other unnecessary components which needlessly and

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[113/] See id. (Noting that Southwestern "is telling providers that they can throw away the hundreds of thousands of modems that many of them have. They need only a sophisticated digital phone line and interface to accept the incoming call. However, Bell will charge providers by the number of connections, called ports, that are allowed at any one time. A provider that replaces 1000 modems with the service can contract with Bell instead for 1000 ports").

[114/] See e.g. Bell Atlantic Internet Solutions, Frequently Asked Questions Topics, <www.bellatlantic.net.faqs>:

> Q. How is Bell Atlantic.net different from the other ISPs and online services?
>
> A. Most online services are now offering some sort of access to the Internet but this access is often not provided in an optimal fashion. . . . In the area of quality, Bell Atlantic.net will differ in the level of access (how often you get a busy), the availability and quality of our technical support, and the speed and performance of our network.

(emphasis added).

artificially inflate competing ISPs' cost structure. Long experience dictates that without specific rules and vigorous enforcement, the ILECs will seek to bundle value-added and other extraneous services with the services customers desire.[115/] Similarly, delaying tactics in provisioning network services and elements to competing ISPs can also have anticompetitive effects.[116/] To help detect such practices, AOL supports reporting requirements and standards that measure BOC performance in furnishing network elements and services to competitors, including unaffiliated ISPs.[117/] Such reporting requirements should be designed to enable the Commission and the public to determine easily whether there are disparities in terms of timeliness and quality of service between the provision of network elements and services by a BOC to itself and its affiliates,[118/] and the provision of such elements and services to competitors.[119/]

[115/] Indeed, the FCC's Expanded Interconnection orders recognized the need for competing providers to gain access only to the services and functionalities they actually needed. See Expanded Interconnection, supra, at ¶¶ 4-7.

[116/] For instance, rather than offer some high-bandwidth capacity services, some ILECs have been slow to tariff these services and then state that they cannot be offered without effective tariffs. The ILECs should not be able to refuse to offer services to their competitors under the guise of "regulatory compliance."

[117/] See In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149, (rel. Dec. 24, 1996), at ¶ 372.

[118/] See id. at ¶ 374.

[119/] The service categories in which such information should be provided should include not only DS0, DS1, and DS3, id. at ¶ 381, but also high-bandwidth services such as OC3 and OC12.

CONCLUSION

AOL agrees with the FCC that to serve all consumers, there must be data-friendly networks that are ubiquitously deployed and economically priced. In the short-term, technological developments, together with FCC policies that promote open access and interconnectivity, will help achieve this goal. In the long term, however, it is the availability of facilities-based, competitive alternative networks that will best stimulate the deployment of network capacity to take advantage of the unprecedented potential of emerging data-based services.

Respectfully submitted,

William W. Burrington
Director, Law and Public Policy
and Assistant General Counsel
Jill A. Lesser
Deputy Director, Law and Public Policy
and Senior Counsel
AMERICA ONLINE, INC.
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 530-7878

Donna N. Lampert
Christopher J. Harvie
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Counsel for America Online, Inc.

Dated: March 24, 1997

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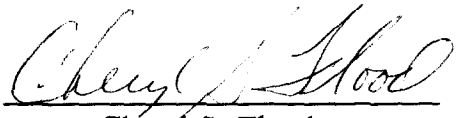

Cheryl S. Flood

*Chairman Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

*Regina Keeney
Chief
Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street N.W.
Washington, D.C. 20554

*Commissioner James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, D.C. 20554

*James D. Schlichting
Chief
Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, D.C. 20554

*Commissioner Rachelle B. Chong
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, D.C. 20554

*Robert M. Pepper
Chief
Office of Plans and Policy
Federal Communications Commission
Room 822
1919 M Street, N.W.
Washington, D.C. 20554

*Commissioner Susan Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, D.C. 20554

*Thomas Power
Chief, Legal Division
Competitive Pricing Division
Federal Communications Commission
1919 M Street, N.W.
Room 518
Washington, D.C. 20554

*Kathleen B. Levitz
Deputy Bureau Chief, Policy
Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, D.C. 20554

*Blair Levin
Chief of Staff
Office of Chairman Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

*Jane Jackson
Deputy Chief
Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, D.C. 20554

*Kevin Werbach
Counsel for New Technology
Office of Plans and Policy
Federal Communications Commission
Room 822
1919 M Street, N.W.
Washington, D.C. 20554

*A. Richard Metzger, Jr.
Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, D.C. 20554

*Elliott Maxwell
Office of Plans and Policy
Federal Communications Commission
Room 822
1919 M Street, N.W.
Washington, D.C. 20554

*Richard Welch
Chief
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, D.C. 20554

*Michael R. Nelson
Office of Plans and Policy
Federal Communications Commission
Room 822
1919 M Street, N.W.
Washington, D.C. 20554

*Pat Degraba
Chief Economist
Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, D.C. 20554

*Daniel Gonzalez
Legal Advisor
Office of Commissioner Chong
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, D.C. 20554

*Laurence D. Atlas
Associate Bureau Chief
Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, D.C. 20554

*James Casserly
Senior Legal Advisor
Office of Commissioner Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, D.C. 20554

*Kathy Franco
Legal Counsel
Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, D.C. 20554

*James R. Coltharp
Special Counsel
Office of Commissioner Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, D.C. 20554

*Thomas A. Boasberg
Senior Legal Advisor
Office of Chairman Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

*International Transcription Service
Federal Communications Commission
2100 M Street, N.W.
Room 140
Washington, D.C. 20037

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